

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TRAVELERS CASUALTY AND
SURETY COMPANY OF
AMERICA,

Third-Party Plaintiff,

v.

FLAWLESS WALLS LLC, a
Washington Limited Liability
Company, MICHAEL BRADLEY, an
individual, JEREMY BOUCHEY, an
individual, JAMIE GORE, an
individual, PAUL CASSEL, an
individual, KORTNEY CASSEL, an
individual, DELMAR, LLC, a
Washington limited liability
company, JROTH, LLC, a
Washington limited liability
company, CASSEL UNLIMITED,
LLC, a Washington limited liability
company,

Third-Party Defendants.

NO. 2:22-CV-0178-TOR

ORDER DENYING THIRD-PARTY
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT is Third-Party Plaintiff's Motion for Summary

ORDER DENYING THIRD-PARTY PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT ~ 1

1 Judgment (ECF No. 68). This matter was submitted for consideration without oral
2 argument. The Court has reviewed the record and files herein and is fully
3 informed. For the reasons discussed below, Third-Party Plaintiff's Motion for
4 Summary Judgment (ECF No. 68) is DENIED.

5 **BACKGROUND**

6 This case involves indemnification of Third-Party Plaintiff Traveler's
7 Casualty and Surety Company ("Travelers") for settlement with Jackson
8 Contractor Group, Inc. ("Jackson") on behalf of Flawless Walls, Inc ("Flawless").

9 Third-Party Plaintiff Travelers, Defendant in the underlying lawsuit, is a
10 Connecticut corporation licensed for insurance in Washington State. ECF No. 17
11 at 2, ¶ 2. Third-Party Defendant Flawless is a Washington limited liability
12 company, Defendant Cassel Unlimited, LLC is a Washington limited liability
13 company, Defendant Delmer, LLC, is a Washington limited liability company,
14 Defendant JROTH, LLC is a Washington limited liability company, and each of
15 the named individual defendants are Washington State citizens. ECF No. 73 at 2–
16 3, ¶¶ 1–11. The Court has jurisdiction under 28 U.S.C. § 1332(a), as there is
17 complete diversity between Travelers and all Third-Party Defendants, and the
18 amount in controversy exceeds \$75,000.

19 On February 9, 2021, Flawless entered in a subcontract with Jackson to
20 perform work on Schweitzer Mountain Hotel and Resort. ECF No. 1 at 3, ¶ 6. On

1 February 25, 2021, pursuant to the agreement, Flawless obtained a Payment Bond
2 and a Performance Bond from Travelers to cover payment and performance of the
3 subcontract work for Jackson in the amount of \$618,187. ECF No. 69 at 3, ¶ 2. In
4 relevant part the surety bond provided that:

5 [T]he condition of this obligation is such that if the Principal shall
6 perform the Construction Work to be done under the Subcontract, then
7 this obligation shall be null and void; otherwise to remain in full force
8 and effect. The Surety's obligation hereunder shall not arise unless
9 Principal is in default under the Subcontract for failing to perform the
Construction Work, and has been declared by the Obligee to be in
default under the Subcontract for failing to perform the Construction
Work; and the Obligee has performed its obligations under the
Subcontract.

10 ECF No. 40-1 at 2.

11 As a condition for surety, Third-Party Defendants were required to enter into
12 an indemnity agreement, in which they would "exonerate, indemnify and save
13 [Travelers] harmless from and against all Loss . . . Amounts due to [Travelers]
14 shall be payable on demand." *Id.* at 3, ¶ 3. The agreement also contained a clause
15 regarding the settlement of claims:

16 Company shall have the right, in its sole discretion, to determine for
17 itself, and Indemnitor whether any claim, demand or suit brought
18 against Company or any Indemnitor in connection with or relating to
19 any Bond shall be paid, compromised, settled, tried, defended or
20 appealed, and its determination shall be final, binding and conclusive
upon the Indemnitors. Company shall be entitled to immediate
reimbursement for any and all Loss incurred under the belief it was
necessary or expedient to make such payments.

1 ECF No. 70-2 at 1–2, ¶ 4.

2 On May 11, 2021, Jackson provided Flawless with a Notice of
3 Supplementation of work due to what it characterized as Flawless’ inability to
4 meet the agreed upon schedule. ECF No. 1 at 4, ¶ 13. However, Flawless
5 maintains that any failure to meet deadlines was due to Jackson’s mismanagement
6 and changing of construction plans. ECF No. 42 at 4–5, ¶¶ 7, 8. On or about
7 August 26, 2021, the contractual agreement between Flawless and Jackson ceased
8 to exist. Within filings pursuant the underlying lawsuit, Jackson asserted that
9 Flawless gave notice that it was going out of business and ceased all work on the
10 Subcontract project. ECF No. 1 at 5, ¶ 16. Flawless asserts that the subcontract
11 was mutually dissolved on August 13, 2021, with the expectation that Flawless
12 would complete select remaining projects and the subcontract would be
13 extinguished. ECF No. 42 at 5, ¶ 7. Specifically, according to Defendants, the
14 renegotiated contract was mutually beneficial as the working relationship with
15 Jackson had broken down. ECF No. 78-1 at 5. As a condition for this agreement,
16 Flawless would not receive payment for the work completed pursuant to the
17 August 2021 payment application. ECF No. 42 at 6, ¶ 8.

18 On March 25, 2022, Jackson sent a demand for payment under the
19 performance bond to Travelers, claiming losses in the amount of \$753.154.40,
20 which Travelers denied. ECF Nos. 69 at 4, ¶ 6, 40-4 at 2–9. The underlying

lawsuit commenced on July 26, 2022. ECF No. 1. On December 16, 2022, Jackson brought a motion for partial summary judgment. ECF No. 26. The Parties notified the Court on February 21, 2023, that Travelers reached a settlement with Jackson for \$325,000 in exchange for full release of the bonds, before a decision was rendered on the motion for summary judgment. ECF No. 70-3 at 2, ¶ 2. The settlement agreement, dated May 2, 2023, also contained a provision that released any claims Flawless may raise in connection with the action, including the underlying subcontract with Jackson. *Id.* at ¶ 4.

In the interim, Travelers asserted a third-party complaint against Defendants to indemnify it for the loss incurred settling the bond with Jackson, plus attorney's fees and related costs. ECF Nos. 60, 73. As it relates to this third-party action, the parties generally disagree as to whether Travelers was exposed to liability under the surety agreement. Defendants assert that Flawless performed under the subcontract, and that Travelers had agreed that Jackson's claim lacked merit under the performance bond. ECF No. 75 at 7. Travelers asserts that its settlement with Jackson was within the bounds of the indemnity agreement and "necessary and expedient to resolve [Jackson's] claim." ECF No. 69 at 5, ¶ 10.

Travelers filed this motion for summary judgment on November 2, 2023, arguing that no issue of material fact remains because the language of the agreement is clear in granting Travelers the ability to settle all claims it deems

1 necessary or expedient per the indemnity clause. ECF No. 68 at 7. Flawless
2 responded, arguing in part that Travelers breached its duty of good faith and fair
3 dealing in the settling of the underlying lawsuit, as evidence existed on the record
4 that Jackson’s claims had no merit, and therefore it was not “necessary or
5 expedient” to settle the claim. ECF No. 75 at 6–7.

6 DISCUSSION

7 I. Summary Judgment Standard

8 Summary judgment may be granted to a moving party who demonstrates
9 “that there is no genuine dispute as to any material fact and the movant is entitled
10 to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party bears the
11 initial burden of demonstrating the absence of any genuine issues of material fact.
12 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the
13 non-moving party to identify specific facts showing there is a genuine issue of
14 material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).
15 “The mere existence of a scintilla of evidence in support of the plaintiff’s position
16 will be insufficient; there must be evidence on which the [trier-of-fact] could
17 reasonably find for the plaintiff.” *Id.* at 252.

18 For purposes of summary judgment, a fact is “material” if it might affect the
19 outcome of the suit under the governing law. *Id.* at 248. A dispute concerning any
20 such fact is “genuine” only where the evidence is such that the trier-of-fact could

1 find in favor of the non-moving party. *Id.* “[A] party opposing a properly
2 supported motion for summary judgment may not rest upon the mere allegations or
3 denials of his pleading but must set forth specific facts showing that there is a
4 genuine issue for trial.” *Id.* (internal quotation marks omitted); *see also First Nat’l*
5 *Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968) (holding that a party
6 is only entitled to proceed to trial if it presents sufficient, probative evidence
7 supporting the claimed factual dispute, rather than resting on mere allegations). In
8 ruling upon a summary judgment motion, a court must construe the facts, as well
9 as all rational inferences therefrom, in the light most favorable to the non-moving
10 party, *Scott v. Harris*, 550 U.S. 372, 378 (2007), and only evidence which would
11 be admissible at trial may be considered, *Orr v. Bank of Am., NT & SA*, 285 F.3d
12 764, 773 (9th Cir. 2002).

13 **II. Claim for Breach of Contract**

14 “Indemnity agreements are interpreted like any other contracts.” *Scott*
15 *Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wash. 2d 573, 580 (1993)
16 (citing *Jones v. Strom Constr. Co.*, 84 Wash. 2d 518, 520 (1974)). Under the Erie
17 Doctrine, a federal court sitting in diversity applies federal procedural law and the
18 substantive law of the forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78
19 (1938). Here, the indemnity agreement contained a jurisdiction provision
20 providing that action may be brought “in any state in which any Indemnitor

1 resides, has property, or in which any Contract is performed.” ECF No. 70-2 at 3,

2 ¶ 14. Each of the third-party defendants are citizens of the state of Washington.

3 Further, the contract was executed in Washington. *Id.* at 3–9. Therefore, the Court
4 applies Washington law.

5 To prove a breach of contract claim, a party must establish three elements:

6 (1) the existence of a valid contract; (2) a breach of a duty imposed by that
7 contract; and (3) damages resulting from that breach. *Nw. Indep. Forest Mfrs. v.*
8 *Dep’t of Labor & Indus.*, 78 Wash. App. 707, 712 (1995). Travelers asserts that it
9 exercised its right under the indemnity agreement to resolve Jackson’s claims and
10 is owed the amount paid in the settlement. ECF No. 68 at 7. Defendants do not
11 dispute the existence of the indemnity agreement, nor that it was breached.

12 Instead, Defendants argue that in settling the underlying claim, Travelers violated
13 its duty of good faith and fair dealing, which Washington law recognizes under
14 every contract. *Colorado Structures, Inc. v. Ins. Co. of the W.*, 161 Wash. 2d 577,
15 588 (2007); *Bond Safeguard Ins. Co. v. Wisteria Corp.*, 173 Wash. App. 1026
16 (2013); *Frank Coluccio Const. Co. v. King Cnty.*, 136 Wash. App. 751, 764
17 (2007). This covenant requires parties to “cooperate with each other so that each
18 may obtain the full benefit of performance.” *Badgett v. Sec. State Bank*, 116
19 Wash. 2d 563, 569 (1991) (internal citations omitted). The duty of good faith
20 arises when the contract in question gives one party discretionary authority to

1 determine a term therein. *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86
2 Wash. App. 732, 738 (1997). According to Defendants, Travelers did not
3 negotiate the settlement with Jackson in good faith because the underlying claim
4 lacked merit, and therefore they are relieved from indemnifying Travelers. ECF
5 No. 75 at 6.

6 As a preliminary matter, Defendants accuse Travelers of failing to submit an
7 “‘itemized, sworn statement’ or other admissible evidence sufficient to satisfy
8 paragraph three of the indemnification statement.” ECF No. 75 at 9. The
9 provision in the indemnification agreement requires that “[a]n itemized, sworn
10 statement by an employee of Company, or other evidence of payment, shall be
11 prima facie evidence of the propriety, amount and existence of Indemnitor’s
12 liability.” ECF No. 70 at 1, ¶ 3. Travelers proof of settlement agreement and
13 declaration of Patrick G. Toulouse serve as satisfaction for this requirement of the
14 indemnification agreement. ECF Nos. 70, 70-3.

15 Defendants offer evidence that they opposed settlement and argue that
16 Traveler’s choice to settle after previously furthering an argument that Jackson’s
17 claim had no merit is a demonstration of bad faith. ECF No. 77 at 5, ¶ 3(e).
18 Defendants assert that Flawless “fully and properly completed its work under the
19 agreement between Jackson Contractor and Flawless Walls.” ECF No. 76 at 4. In
20 position letters sent to Travelers, Defendants assert that “Jackson Contractor Failed

1 to Satisfy the Conditions Precedent to Maintaining any Claim or Action Against
2 the Bond” and “Flawless Walls Performed the Construction Work Such that any
3 Obligation of Travelers under the Bond is Now Null and Void,” and were within
4 the bounds of the subcontract, therefore the surety agreement would not be
5 triggered. ECF Nos. 78-1 at 6–7; 78-2 at 3. At all times they maintained that
6 Jackson’s claim against the performance bond was improper because “Flawless
7 Walls performed the work under the parties’ agreement . . . Flawless Walls
8 performed the construction work under the parties’ contract and, as a result, any
9 obligation of Travelers under the performance bond is null and void.” ECF 78-2 at
10 3. They also request the Court stay its order on the present motion to extend their
11 discovery window to determine whether payment to Jackson was “necessary OR
12 expedient.” *Id.* at 13.

13 This matter is similar to *Bond Safeguard Insurance Co. v. Wisteria Corp.*,
14 173 Wash. App. 1026 (2013), but presents an important distinction. Initially, both
15 Wisteria, a logging company, and its bond provider, Bond Safeguard Insurance
16 Co., refused to pay the Department of Natural Resources (“DNR”) after it alleged
17 the logging company breached conditions of its contract to cut and remove trees.
18 173 Wash. App. 1026 at *2. Before a lawsuit was filed, the surety provider settled
19 the claim with DNR pursuant to the indemnity clause:

20 The Company shall have the exclusive right to determine for itself and
the Indemnitors whether any claim or suit brought against the Company

1 or the Principal upon any such bond shall be settled or defended, and
2 its decision shall be binding and conclusive upon the Indemnitors.

3 *Id.* at *1.

4 The bond provider then sued Wisteria for indemnification of the payment to
5 DNR, and in response, the logging company argued that it was exempt for payment
6 because the bond provider had breached its duty of good faith by not properly
7 investigating the defenses set forth before settling. *Id.* at *2. The court rejected
8 the logging company's argument, even in the face of its contention that DNR's
9 claim was meritless, because it determined that the bond provider was within its
10 right to settle pursuant to the contract. *Id.* at *3. The Court arrived at this
11 conclusion in part because Wisteria provided no evidence of its compliance with
12 the contract, and as such could not prove it would have fared better without the
13 settlement. *Id.* at *4. The Court found that, given the information provided, the
14 bond provider properly investigated and settled the claim before a lawsuit could be
15 filed, and therefore was within its right to seek indemnification. *Id.*

16 Like in *Bond Safeguard Insurance Co.*, Travelers examined the evidence
17 and made a business decision to settle. In this case, Travelers benefitted from a
18 more in-depth investigation than that of *Bond Safeguard Co.*, because Travelers
19 had the opportunity to review Defendants' position as part of the underlying
20 lawsuit. However, after reviewing the evidence, Travelers chose to litigate this

1 matter, rather than settling initially, and defended Flawless in response to
2 Jackson's Motion for Summary Judgment, taking the position that it had performed
3 its duty under the subcontract. ECF No. 37 at 7–8. Travelers placed the blame on
4 Jackson for creating delays in the project and pointed to the fact that Jackson never
5 declared Flawless in default or sought to terminate the subcontract for cause, both
6 conditions precedent to accessing the performance bond. *Id.* at 8, 17; *see also* ECF
7 No. 17 at 6–7, ¶ 23 (“On information and belief, Flawless completed its
8 Subcontract performance as modified.”); ECF No. 37 at 3 (“Flawless encountered
9 issues with the Project, namely due to numerous design issues leading to hundreds
10 of Requests for Information (“RFIs”) to the Architect, responsive Architect’s
11 Supplemental Instructions (“ASIs”), and ensuing change orders.”); *Id.* at 4 (“Since
12 there is genuine issue of material fact as to Flawless’ performance under the
13 Subcontract and the scope of that Subcontract, this [motion for summary
14 judgment] should be denied”). Unlike Wisteria in *Bond Safeguard Ins. Co.*,
15 Flawless has produced evidence, including statements of position Flawless
16 provided to Travelers that describe a rocky and tenuous working relationship with
17 Jackson, in which Flawless still managed to substantially perform, which raise
18 questions of material fact as to whether it would have fared better without the
19 settlement. *See generally* ECF Nos. 78-1, 78-2; *Bond Safeguard Ins. Co.*, 173
20 Wash. App. at *4. Additionally, Flawless provided an email exchange with

1 Jackson disputing the costs Jackson demanded under the Notice of
2 Supplementation. ECF No. 42-1. Third-Party Plaintiff Travelers adopted and
3 relied on many of these arguments both in its initial correspondence denying
4 Jackson's claim and in its Cross Motion for Summary Judgment in the underlying
5 suit. *See generally* ECF Nos. 37, 40-3, 40-4, 40-5.

6 The indemnification agreement gives Travelers sole discretion "under the
7 belief it was necessary or expedient" to settle claims for itself and Defendants.
8 ECF No. 70-2 at 1–2, ¶ 4. While Defendants would read ambiguity into this
9 provision, the Court declines to do so, as this specific line had been upheld by
10 courts in other jurisdictions. *Travelers Cas. & Sur. Co. of Am. v. Highland P'ship,*
11 *Inc.*, No. 10CV2503 AJB DHB, 2012 WL 5928139, at *7 (S.D. Cal. Nov. 26,
12 2012); *Travelers Cas. & Sur. Co. of Am. v. Dunmore*, No. CIV S-07-
13 2493LKK/DAD, 2009 WL 1586936, at *2 (E.D. Cal. June 5, 2009). However, the
14 Court does find that questions of fact still remain as to whether Travelers breached
15 a duty of good faith to Defendants in settling the underlying lawsuit with Jackson.
16 In interpreting Washington contract law, the Ninth Circuit has determined that
17 "[g]ood faith limits the authority of a party retaining discretion to interpret contract
18 terms; it does not provide a blank check for that party to define terms however it
19 chooses." *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 910 (9th Cir.2001).

20 Travelers relies extensively on *Dunmore* and *Highland Partnership*, in

1 support of its contention that the explicit term of the indemnification provision
2 gives it the sole discretion to settle claims, and that the Court cannot find a breach
3 of good faith because to do so would upset the terms of contract. ECF 80 at 5–6;
4 *See Highland P'ship, Inc.*, No. 10 CV2503 AJB DHB, 2012 WL 5928139, at *6
5 (internal citation omitted) (“[T]he implied covenant [of good faith] will only be
6 recognized to further the contract's purpose; it will not be read into a contract to
7 prohibit a party from doing that which is expressly permitted by the agreement
8 itself.”). These cases are based on California contract law and are thus persuasive
9 but not binding on the Court. The Court in *Highland Partnership* declined to find
10 a breach of the duty of good faith because it determined that all parties were
11 sophisticated business entities and finding bad faith in the settlement of a claim
12 would rewrite the terms of the indemnification contract. No. 10CV2503 AJB
13 DHB, 2012 WL 5928139, at *7. However, in making this finding, the court drew
14 attention to the limiting factor of the same indemnification provision at issue here;
15 namely that Travelers has the sole discretion to settle claims in ways it finds to be
16 expedient *or* necessary. *Id.* (emphasis added). In considering all facts in the light
17 most favorable to Defendants, the Court cannot determine if Travelers, in good
18 faith, made a “necessary or expedient,” settlement given Traveler’s position
19 regarding Flawless in its initial dealing with Jackson.

20 While the indemnification agreement here gives Travelers sole discretion to

1 settle claims, contract law requires that both parties receive the benefit of the
2 indemnification agreement within the surety. Evidence provided by both parties
3 indicates that Travelers believed that Flawless upheld, at least to some extent, its
4 end of the bargain in performing under the subcontract. *See* ECF No. 17 at 6–7, ¶
5 23; *see generally* ECF No. 37 at 8–10 (“Flawless therefore had an opportunity to
6 cure to the extent it was in default, curing any default by August of 2021 when the
7 work was complete.”) (“Further, after Flawless and Jackson performed their work,
8 there was no work left to perform under the subcontract.”). *See Edmonson v.*
9 *Popchoi*, 172 Wash. 2d 272, 280 (2011) (quoting RESTATEMENT (SECOND)
10 OF CONTRACTS § 205 cmt. a (1981)) (“The duty of good faith requires
11 ‘faithfulness to an agreed common purpose and consistency with the justified
12 expectations of the other party.’”). Statements made by Travelers demonstrate that
13 it believed Flawless to have performed under the subcontract. ECF No. 37 at 8
14 (“Further, any delay was not Flawless’ fault, rather it was caused by numerous
15 design changes.”).

16 Thus, as it stands the Court cannot definitively say if the settlement for
17 \$325,000 was done in good faith such that each party receives the “full benefit of
18 performance.” *Bagett*, 116 Wash.2d at 569. The terms of the surety agreement
19 were only triggered if Flawless failed to perform the work under the subcontract,
20 or if it was found in default for failure to perform. ECF No. 40-1 at 2. Defendants

1 have raised a question of material fact as to whether they upheld their end of the
2 surety agreement relating to the subcontract, and thus have been denied the full
3 benefit of that contract with Travelers. *See Rekhter v. State, Dep't of Soc. &*
4 *Health Servs.*, 180 Wash. 2d 102, 113 (2014) (finding that the duty of good faith
5 only attaches to express terms of a contract). Given the discretionary power that
6 Travelers had over the settlement of the claim and the question of fact remaining as
7 to whether conditions of the surety agreement were triggered, summary judgment
8 is not proper. ECF No. 70-3 at 2, ¶ 4.

9 The Court notes that the window for discovery in this matter closes on May
10 13, 2024, and Third-Party Defendants are free to seek additional materials
11 provided they adhere to the rules therein. ECF No. 67 at 3.


12 **ACCORDINGLY, IT IS HEREBY ORDERED:**

13 Third-Party Plaintiff's Motion for Summary Judgment (ECF No. 68) is
14 **DENIED.**

15 The District Court Executive is directed to enter this Order and furnish
16 copies to counsel.

17 DATED January 5, 2024.




THOMAS O. RICE
United States District Judge